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No. 85-21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP., *Petitioners*,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should overrule Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922).

No. 85-21

In The
SUPREME COURT of the UNITED STATES

October Term, 1985

Square D Company And Big D
Building Supply Corp.,

Petitioners,

v.

Niagara Frontier Tariff
Bureau, Inc., et al.,

Respondents.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF C.D. AMBROSIA TRUCKING COMPANY, INC., DAVID W. REANEY AND REANEY DOCK COMPANY, AND ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of the Court, amici seek leave to file

the attached brief amicus curiae in support of petitioner. Amici have a vital interest in the issues presented by this case and will present this Court with relevant facts and arguments unlikely to be put forth by the parties. 1/

Amici--two dock companies and a trucking company--are among the plaintiffs in a consolidated antitrust litigation denominated MDL 587, the Lower Lake Erie Iron Ore Antitrust Litigation. Various railroad companies are defendants in MDL 587, which is currently pending before the United States District Court for the Eastern District of Pennsylvania.

The amici sought to compete with the MDL 587 defendants in the business of providing dock services for iron ore at

1/ The parties have not consented to the filing of the attached brief.

Lake Erie ports and the business of moving the ore overland to steel mills. However, the amici were foreclosed from competing by acts and practices of the MDL 587 defendants, including four railroads which pleaded nolo contendere to a criminal indictment based on the same acts alleged by amici. The convictions entered upon the nolo plea were upheld by the District of Columbia Circuit on an appeal by one of the railroads, which unsuccessfully argued that the railroads' actions were immune from the antitrust laws under the Interstate Commerce Act. United States v. Bessemer and Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983).

In MDL 587, and in previously filed but nearly identical litigation pending in the Sixth Circuit upon appeals from decisions of the district court in Cleve-

land, 2/ the railroad defendants are arguing that antitrust treble damage actions are barred by Keogh v. Chicago & Northwestern Railway, 260 U.S. 156 (1922), the decision whose continued vitality is at issue here. The railroads' argument has already been made against would-be competitors in the previously filed Sixth Circuit litigation and against shippers in the MDL 587 litigation, and it is a certainty that the argument will also be made against would-be competitors in the MDL 587 litigation. 3/

2/ Pinney Dock & Transport Company v. Penn Central Corp. et al., United States Court of Appeals for the Sixth Circuit, Nos. 84-3653, 84-3654, 84-3876 and 84-3877. Some of the decisions of the district court in Pinney have been published. They can be found at 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607; 1983-2 Trade Cases ¶65,608; 1982-83 Trade Cases ¶¶65,053 and 65,054; and 1982-1 Trade Cases ¶64,687.

3/ The MDL 587 court upheld the Keogh argument against shippers. In Re Lower

(footnote continued on next page)

Although the Keogh doctrine was born in the context of suits by shippers, and was long asserted almost exclusively in that context, efforts to use it to bar suits by would-be competitors have occurred with some frequency in large antitrust cases during recent years. 4/ Those efforts are relevant to this Court's

(footnote continued from previous page)

Lake Erie Iron Ore Antitrust Litigation, MDL 587, Memorandum and Pretrial Order No. 4, decided June 5, 1985. Its opinion was cited to this Court by both the government, in its amicus brief urging that certiorari be granted in this case, and by the respondents, in their main brief opposing certiorari. Respondents also appended the decision to their brief in opposition. Joint Brief In Opposition, Appendix B.

4/ See, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. den., 459 U.S. 1227 (1983); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981); Essential Communications Systems, Inc. v. AT&T et al., 610 F.2d 1114 (3d Cir. 1979); Frontier Enterprises, Inc. v. Amador Stage

(footnote continued on next page)

assessment of whether Keogh should be overruled. But points specifically pertinent to this use of Keogh against would-be competitors are unlikely to be developed by the parties to this case, since Keogh was applied here to bar suit by shippers, not competitors. Thus, the petition for certiorari understandably does not mention matters specifically pertinent to the use of Keogh against foreclosed competitors, and the brief in opposition studiously

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Lines, Civil No. S-83-940 MLS, E.D. Cal., decided October 2, 1985; Transkentucky Transportation Railroad et al. v. Louisville and Nashville Railroad Co. et al., 1983-2 Trade Cases ¶65,476, (E.D. Ky. 1983); Litton Systems v. AT&T, 487 F. Supp. 942 (S.D. N.Y. 1980), aff'd. 700 F.2d 785 (2d Cir. 1983), cert. den. 464 U.S. 1073 (1984); Marnell v. United Parcel Service of America, 260 F.Supp. 391 (N. D. Cal. 1966).

ignores such matters. 5/ It is the omitted matters, pertinent to the relatively frequent recent use of Keogh to try to bar antitrust suits by foreclosed competitors, that amici wish to bring to the attention of the Court.

The omitted matters amici wish to discuss are of great importance to the national economy. For cases in which Keogh has been asserted in an effort to bar antitrust actions by competitors have involved basic industries such as electric power, telephonic communications, and railroads. In such industries, one or a few companies have possessed and often continue to possess monopolistic or semi-

5/ For example, in arguing that the Keogh doctrine has been "uniformly" applied by the courts, the brief in opposition confines itself to saying that no court has ever allowed a shipper to sue despite Keogh, and ignores the fact that numerous courts have allowed competitors to sue despite Keogh. Joint Brief In Opposition, pp. 6, 8.

monopolistic power at one or more levels in the vertical chain of production and distribution. For example, the American Telephone and Telegraph Company long possessed total power in various markets for the manufacture and sale of telephone equipment, the installation and servicing of such equipment, the provision of local telephone service, and the provision of long distance service. Similarly, electric power companies often possess regional monopolies over both the production of electricity and its transmission over long distance wires. Railroads--as in the iron ore cases--often possess individual or joint monopolies over both dock facilities and inland transportation.

When companies in basic industries have monopolistic or semi-monopolistic power at one or more levels in the chain of

production and distribution--i.e., when they possess a bottleneck monopoly--they can use the power they possess at a bottleneck monopoly level to bar companies that wish to compete with them at a different level. Contrary to the goals of the antitrust laws, bottleneck monopolists are thereby able to stifle technological innovation and cheaper prices, and to preserve their dominion over entire industries.

This is precisely what occurred in reported cases in which Keogh was asserted to try to block antitrust damage suits by foreclosed competitors. AT&T, for example, used the power it possessed at various levels of the telephone industry to bar the entrance of companies that wished to sell technologically advanced telephone equipment or to provide alternative long dis-

tance service. 6/ Electric power companies have used their dominion over transmission wires to bar companies that wished to compete for retail sales of electricity. 7/ Railroads used their power over dock facilities to foreclose companies that wished to provide competing means of inland transportation, and used their power over inland transportation to foreclose companies that wished to provide competing, technologically advanced dock facilities. 8/

6/ AT&T's actions are extensively discussed in United States v. AT&T, 524 F.Supp. 1336 (D.D.C. 1981); and Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983), cert. den., 464 U.S. 1073 (1984).

7/ See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

8/ See United States v. Bessemer & Lake Erie R. Co., supra; Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607, 1983-2 Trade Cases ¶65,608.

Because they are in regulated industries, telephone companies, electric power companies and railroads have used tariffs as a major vehicle for accomplishing their purpose of barring competitors and stifling technological innovation and cheaper prices. AT&T, for example, imposed a tariff requirement under which an unnecessary and expensive interface device had to be used to connect equipment of competing manufacturers to AT&T's telephone lines. It also employed interconnection tariffs that effectively barred companies such as MCI from providing competing long distance telephone service. Electric power companies have used tariffs to impose a price squeeze upon would-be retail competitors. 9/ Railroads have prevented competition from technologically

9/ See, e.g., City of Kirkwood v. Union Electric Co., supra; City of Groton v. Connecticut Light & Power Co., supra.

more advanced non-railroad docks (called "private docks") by refusing to file tariffs providing the same freight rates for iron ore shipped from the private docks as for iron ore shipped from the railroad docks, thus leaving the private docks with only far higher freight rates that made it impossible for them to compete with the railroad docks.

When the anticompetitive conduct of bottleneck monopolists has been challenged in antitrust cases brought by foreclosed competitors, the defendants have often claimed immunity under Keogh because they acted by means of filed tariffs, or because they acted by means of refusals to file tariffs, or because the lost profits of foreclosed competitors assertedly could have depended on rates that would have been

set forth in tariffs. 10/ Thus, the Keogh doctrine has been invoked to try to shield massive anticompetitive conduct that barred competition and innovation in fundamental industries, and has been invoked not only when defendants have filed tariffs, but when they have not done so, and when tariffs assertedly could have affected competitors' profits.

It is thus clear that the matters amici wish to discuss are of serious import to the economy and should be brought to the attention of this Court when it is considering the future of the Keogh doctrine. Amici therefore wish to submit the attached amicus curiae brief to aid the Court in its consideration of this case,

10/ The defendants have also claimed immunity under the regulatory statutes governing them.

and respectfully move that leave to file be granted.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

The interest of the amici has been set forth in the foregoing motion for leave to file this brief.

SUMMARY OF ARGUMENT

A. Recent efforts to use Keogh to bar antitrust suits by foreclosed competitors are relevant to this Court's assessment of the future of the Keogh doctrine. Such efforts have occurred with relative frequency in large antitrust cases. The goal of those efforts has been to try to immunize massive anticompetitive conduct that foreclosed and delayed technological innovation or lower prices in basic industries such as the telephone, electric power and railroad industries.

In industries such as these, companies often possess "bottleneck" monopoly power at one or more levels in the vertical chain of production and distribution. This "bottleneck" power frequently is used to

foreclose companies at other levels. As shown by litigation in the last decade alone, railroads have used bottleneck power over docks and rail lines to foreclose companies which sought to provide vessel transportation, competing dock services or competing overland transportation for iron ore, electric power companies have used bottleneck power over long distance transmission wires to foreclose competitors that sought to make retail sales of electricity, and AT&T used bottleneck power possessed at several levels to foreclose competing manufacturers of long distance equipment and competing providers of long distance telephone service.

B. When the anticompetitive actions of bottleneck monopolists have been challenged in antitrust cases, they have argued that their actions are immunized from the antitrust laws by regulatory statutes and

that damage suits are barred by Keogh. The arguments for immunity under regulatory statutes have failed. The defendants have thus been reduced to reliance on Keogh to try to obtain the immunity from antitrust damages that is not provided by their governing regulatory statutes.

In attempting to obtain immunity under Keogh, defendants have made arguments ranging from the conventional to the expansive and inventive. It has been urged that Keogh bars suits by foreclosed competitors because plaintiffs were claiming that high tariff rates precluded them from entering business or competing effectively, because plaintiffs were asserting that defendants' refusal to file tariffs precluded plaintiffs from entering a business, or because the exact amount of plaintiffs' lost profits assertedly could have depended in part

on the extent to which the defendants would have filed new, lower tariff rates.

C. The efforts to use Keogh to bar antitrust damage actions by foreclosed competitors have been rejected by numerous courts. These rejections are correct. Thus, if Keogh is not totally overruled, as amici believe it should be, the Court should make clear that it cannot be used in any way to bar suits by foreclosed competitors.

1. The holding of and major reasons for Keogh were directed towards suits by shippers, and have no bearing on suits by competitors. Keogh held that the legal rights of shippers are measured by published tariffs. It said that otherwise Congress' paramount purpose of preventing discrimination against shippers might be defeated. Such defeat could occur because an antitrust recovery might, like a rebate,

give a plaintiff shipper a preference over other shippers.

Thus the ruling and prime rationale of Keogh were confined to barring suits by shippers, not competitors.

Furthermore, Keogh's concern that rates relied upon by plaintiffs might be hypothetical was specifically and in terms related to the fear that a hypothetical rate propounded by shipper plaintiffs might be discriminatory against other shippers who did not file suit. Thus the concern was not addressed to and has no effect upon suits by foreclosed competitors.

There also are other reasons why the fear of hypothetical rates expressed in Keogh cannot preclude antitrust damage suits by foreclosed competitors. Today it is common in antitrust litigation to determine the charges, prices and profits that would have prevailed in the absence of

anticompetitive actions. Also, the lost profits of a foreclosed competitor often depend quite heavily on costs and expenses other than tariff rates.

2. This Court has often ruled that implied immunities from the antitrust laws are not favored, and will be found only when there is clear repugnancy between a regulatory scheme and the application of the antitrust laws. In the absence of such clear and irreconcilable conflict, the Court has been unwilling to extend immunity beyond the line marked by Congress. Application of Keogh to bar damage suits by competitors would run contrary to this jurisprudence. For such application would provide de facto immunity from damage suits where arguments for express or implied immunity under regulatory statutes have failed, and would thereby extend immunity beyond the Congressional grant.

3. Use of Keogh to bar suits by foreclosed competitors would enable bottleneck monopolists to foreclose competition, technological innovation and lower prices in basic industries, without having to fear that they will one day be called to account in treble damages. By eliminating one of the most powerful deterrents to anticompetitive conduct -- i.e., by eliminating treble damages -- the use of Keogh to prevent suits by competitors will encourage the kinds of competition-destroying, technology-retarding conduct that occurred in the railroad, telephone and electric power industries. To encourage such conduct is inconsistent with the needs of the national economy, which requires technological innovation and improvements that result in lower prices, and is inconsistent with antitrust policy because the antitrust laws are intended to

promote innovation and lower prices.

The inconsistency with the needs of the economy and with antitrust policy is heightened because there have been cases in which the conduct sought to be immunized by Keogh has been undertaken with maximum possible secrecy and because Keogh is invoked on an expansive basis. The use of Keogh to shield secret anticompetitive actions, and its use on an expansive basis, increase its capacity to immunize and thereby encourage conduct that retards technological innovation and lower prices.

ARGUMENT

I. IN THE RAILROAD, TELEPHONE AND ELECTRIC POWER INDUSTRIES, COMPANIES WITH BOTTLENECK MONOPOLY POWER AT ONE LEVEL IN THE CHAIN OF PRODUCTION AND DISTRIBUTION HAVE USED THAT POWER TO FORECLOSE COMPETITION AT OTHER LEVELS, AND HAVE SUBSEQUENTLY SOUGHT TO USE KEOGH AS A BAR TO DAMAGE ACTIONS BROUGHT BY FORECLOSED COMPETITORS

A. Introduction

As stated in the accompanying motion for leave to file, this brief is being submitted to acquaint the Court with matters pertinent to efforts to use the Keogh doctrine [1/] to bar antitrust suits by foreclosed competitors. Such efforts are highly relevant to the Court's assessment of the future of Keogh, including consideration of whether it should be overruled. For the efforts to use Keogh against competitors have occurred with relative frequency in recent years, and the goal of these efforts has been to try to immunize massive anticompetitive conduct that forestalled technological innovation or lower prices in industries such as

1/ Keogh v. Chicago and Northwestern Railway, 260 U.S. 156 (1922).

the electric power, telephone and railroad industries.

In order to provide the Court with a concrete illustration of recent attempts to use Keogh against competitors, amici shall begin by describing relevant particulars of one of these attempts, involving the handling and transportation of iron ore. [2/]

B. The Foreclosure of Vessel, Dock And Trucking Companies From The Iron Ore Business, And The Resulting Criminal And Civil Actions

In the 1950's, 1960's and 1970's, various ship, dock, and trucking companies sought to participate in the transportation

2/ Extensive judicial explanations of numerous iron ore matters described here by amici can be found in United States v. Bessemer & Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983); Pinney Dock & Transport Co. v. Penn Central Corp. et al., 600 F.Supp. 859, 1983-2 Trade Cases ¶65,607 (N.D. Ohio 1983); and Pinney Dock & Transport Co. v. Penn Central Corp. et al., 1983-2 Trade Cases ¶65,608 (N.D. Ohio, 1983).

and handling of iron ore arriving at Lake Erie ports. The ship companies sought to participate in the business of transporting the ore over the Great Lakes to the Lake Erie ports, the dock companies sought to participate in the business of providing dock handling services for the ore, and the truck companies sought to participate in the business of transporting the ore overland from docks to steel mills. Participation in the relevant businesses by docks and truckers would have made them direct competitors of a number of eastern railroads that own docks providing ore handling services and that carry ore from docks to steel mills.

For many years, however, the ship, dock and trucking companies were foreclosed from participation in the relevant businesses by actions of the railroads. Such

actions began in the mid 1950's and continued for approximately twenty-five years. In pending antitrust suits these actions are alleged to have been jointly monopolistic in character and to have been taken pursuant to a secret conspiracy.

The railroads' conspiratorial actions gave rise to a criminal antitrust suit brought by the United States and based in major part on documents subpoenaed from the railroads' files. Four of the railroads pleaded nolo contendere. The convictions entered upon the pleas of nolo were upheld by the District of Columbia Circuit on an appeal by one of the railroads, which argued unsuccessfully that the railroads' actions were immunized from the antitrust laws by the Interstate Commerce Act. United States v. Bessemer and Lake Erie R. Co., 717 F.2d 593 (D.C. Cir. 1983).

When discovered, the railroads' actions also gave rise to civil antitrust suits. Two of the civil cases are presently pending in the Sixth Circuit upon appeals from decisions of the federal district court in Cleveland. Pinney Dock & Transport Co. et al. v. Penn Central Corp. et al., United States Court of Appeals for the Sixth Circuit, Nos. 84-3653, 84-3654, 84-3876, and 84-3877. The rest of the cases, including ones brought by amici, have been consolidated for pretrial proceedings in the United States District Court for the Eastern District of Pennsylvania, and are denominated MDL 587, the Lower Lake Erie Iron Ore Antitrust Litigation. Both the Sixth Circuit litigation and MDL 587 include suits by would-be competitors, such as amici, who were foreclosed by the railroads' actions

from entering the relevant lines of business. 3/

C. The Economic Background Of The Railroads' Actions, And Specific Anticompetitive Steps Taken By The Railroads

The criminal indictment and the civil complaints have alleged the same jointly monopolistic and conspiratorial actions by the defendant railroads. The economic background of these actions is as follows.

For decades, mud-like iron ore was transported across the Great Lakes to Lake Erie railroad docks in vessels called bulkers. These boats were unloaded at the railroad docks by means of huge cranes, usually called huletts. Each crane had a clamshell-like claw that dipped into the boat to grab a load of iron ore, which was

3/ One of the amici, Ambrosia Trucking, was finally able to enter the business of hauling ore overland in 1976.

then deposited on the dock. After the ore was unloaded, it was moved to steel mills via railroad "line hauls."

Beginning in the 1950's, iron ore began to be shipped across the Great Lakes in pelletized rather than mud-like form. Pelletized ore can be carried in technologically advanced boats which unload themselves by means of an internal conveyor belt and a boom that deposits the ore on the dock. These "self unloaders" render unnecessary the large and expensive cranes used by the railroad docks to unload bulkers. And, because they unload themselves, the self unloaders could be received at non-railroad docks (called private docks) that did not have or need the cranes possessed by railroad docks. Because they did not have to invest in these cranes, the private docks could charge less than railroad docks.

The potential use of self unloaders and private docks was regarded as a serious threat by the railroads. For they endangered the railroads' stranglehold over the business of providing dock services for iron ore. Also, if self unloaders went to private docks, trucks would ultimately be able to participate in the inland transportation of ore by carrying ore from the private docks.

The railroads therefore determined to prevent the use of self unloaders, private docks and trucks. By means of secret meetings and private correspondence that began in the mid 1950's and continued for approximately twenty-five years, they conspiratorially decided to and did take numerous steps to preclude self unloaders from being used to carry ore, to prevent private docks from handling ore in competition with railroad docks, and to

preclude trucks from carrying ore in competition with rail hauls. Many of the conspiratorial steps involved the use of tariffs. The steps included the following measures:

(1) Railroads refused to grant the same "commodity" rates for line hauls of ore from private docks as applied on line hauls of ore from railroad docks. The refusal to grant private docks a "commodity" rate rendered them unable to compete with railroad docks. For in the absence of a commodity rate, the applicable rate from private docks was a "class" rate which was often two to three times higher than the "commodity" rate applicable from railroad docks.

(2) Railroads refused to sell or lease land to companies that intended to establish private docks to handle self unloaders.

(3) Railroad docks refused to establish dock handling rates for self unloaders that reflected the actual economic savings realized because those boats did not need to be unloaded by large cranes but instead unloaded themselves.

(4) Railroads refused to allow self unloaders to discharge ore at railroad docks.

(5) Railroads levied arbitrary charges upon trucks that sought to pick up ore at railroad docks or wholly prohibited such pick-ups.

(6) Railroads sought to harass truck movements of ore.

The railroads' conspiratorial actions to prevent the use of self unloaders, private docks and trucks were highly successful. For twenty years, until the mid 1970's, the self unloaders, private docks and trucks were kept out of the

business of transporting and handling ore. Thereafter, the participation of private docks and truckers was kept limited. The railroads' anticompetitive actions thus stifled technological innovation, cheaper prices, and direct competition with the railroads in the businesses of providing dock handling services for ore and transporting ore overland to steel mills.

D. Bottleneck Monopoly Power Possessed At One Level Of Basic Industries Has Been Used To Foreclose Competition At Other Levels

Companies with monopoly power at a particular level in the chain of production and distribution sometimes use that power to foreclose competition at the monopolized level. In certain industries, however, monopoly power possessed at one or more levels can also be used to foreclose competition at other levels. The latter use of monopoly power occurred in the Lake

Erie iron ore cases. By taking actions to keep out self unloaders, private docks and trucks, the railroads there used monopoly power at two levels to stifle companies at three levels in the chain of transportation for ore and to prevent competition.

The railroads possessed monopoly control over the iron ore dock business on Lake Erie and over the business of transporting ore overland. By failing to establish dock rates that reflected the savings made possible by self unloaders, and by barring these vessels from railroad docks, the railroads used their monopoly power over the dock business to discourage and foreclose the use of self unloaders. By refusing to grant iron ore "commodity" line haul rates to private docks, the railroads used their monopoly power over inland transportation to foreclose competition from private docks. And by levying

arbitrary charges against or wholly prohibiting truck pick-ups of ore at railroad docks, the railroads used their monopoly power over the dock business to foreclose competition from trucks.

The use of monopoly power possessed at one level of a vertical chain of production and distribution to bar competitors from other levels has become an all too frequent occurrence in basic industries. Thus, in the last decade alone, litigation has shown that such "bottleneck" monopoly power has been extensively used to preclude competitors, technological innovation and/or cheaper prices in the telephone and electric power industries, as well as the railroad industry.

In the telephone industry, American Telephone and Telegraph Company long possessed total monopoly power in numerous

markets for the manufacture and sale of telephone equipment, the purchase, installation and servicing of equipment, the provision of local telephone service over local phone lines, and the provision of long distance service over long distance lines. Litigation brought by competitors and by the United States Government--whose lawsuit led to the break-up of AT&T--showed that AT&T had extensively used its bottleneck power over various levels of the industry to bar competitors and innovation at other levels. 4/ For example, AT&T used its power over the purchase, installation

4/ AT&T's actions are extensively discussed in United States v. AT&T, 524 F.Supp. 1336 (D.D.C. 1981); and Litton Systems, Inc. v. AT&T, 700 F.2d 785 (2d Cir. 1983); cert. den., 464 U.S. 1073 (1983).

and servicing of equipment to foreclose non-AT&T manufacturers, and used its power over local telephone lines to foreclose competing manufacturers and competing providers of long distance service (such as MCI).

In the electric power industry, power companies often possess regional monopoly power over both the production of electricity and its transmission over long distance wires. The companies' dominion over transmission wires has often been used to bar firms that wish to compete for retail sales of electricity; such preclusion has been accomplished by refusing to transmit (or "wheel") power to the retail competitors [5/] or by imposing a price squeeze upon

5/ See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

them. [6/]

E. Bottleneck Monopolists Have Sought To Use Keogh To Obtain Immunity From Antitrust Damage Actions Challenging The Anticompetitive Conduct By Which They Foreclosed Competitors

When the anticompetitive conduct of bottleneck monopolists has been challenged in antitrust cases, they have argued that their actions are expressly or impliedly immune under regulatory statutes. They also have argued that damage suits are barred by Keogh. The argument for immunity under regulatory statutes has largely failed, [7/] since the pertinent statutes generally are not designed to protect the

6/ See, e.g., City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2d Cir. 1981).

7/ E.g., Otter Tail Power Co. v. United States, supra; United States v. Bessemer &

(Footnote continued on next page)

use of monopoly or semimonopoly power at one level to bar competitors at another level. Thus the bottleneck monopolists are reduced to reliance on Keogh to try to obtain the immunity from antitrust damages that is not provided by their governing regulatory statutes. 8/

(Footnote continued from previous page)
Lake Erie R. Co., supra; Transkentucky Transportation Railroad, et al. v. Louisville and Nashville Railroad Co., 1983-2 Trade Cases ¶65,476 (E.D. Ky. 1983); Litton Systems, Inc. v. AT&T, 487 F.Supp. 942 (S.D. N.Y. 1980), aff'd, 700 F.2d 785 (2d Cir. 1983), cert. den., 464 U.S. 1073 (1984); United States v. AT&T, 461 F.Supp. 1314 (D.D.C. 1978); Marnell v. United Parcel Service of America, Inc., 260 F.Supp. 391 (N.D. Cal. 1966).

8/ E.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), cert. den., 459 U.S. 1227 (1983); City of Kirkwood v. Union Electric Co., 671 F.2d 1173 (8th Cir. 1982); City of Groton v. Connecticut Light & Power Co., 662 F.2d 921 (2nd Cir. 1981); Essential Communications Systems, Inc. v. AT&T, et al., 610 F.2d 1114 (3rd Cir. 1979); Frontier Enterprises, Inc. v. Amador Stage Lines, Civil No. S-83-940 MLS, E.D.
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In seeking to obtain immunity under Keogh, regulated monopolists, no matter how broad the panoply of their actions, essentially argue that rate and tariff actions are the root cause of any and all alleged anticompetitive harm and that their conduct is therefore immunized by the Keogh doctrine. Basically, they try to turn each case into a rate and tariff matter, even if they also took non-rate or non-tariff actions. They alternatively argue, sometimes correctly, that rate and tariff actions were the preponderant cause of a competitor's injury. Therefore, they say, under Keogh the competitor cannot recover damages for most of the harm it suffered.

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Cal., decided October 2, 1985; Transkentucky Transportation Railroad et al. v. Louisville and Nashville Railroad Co., supra; Litton Systems, Inc. v. AT&T, supra, note 7; Marnell v. United Parcel Service of America, supra.

Arguments that rates and tariffs are the root or preponderant cause of harm, and that anticompetitive conduct is therefore wholly or largely immunized under Keogh, have ranged from the conventional to the inventive. In conventional form, the argument is that Keogh bars damages because the plaintiff is claiming that high tariff rates precluded it from entering a business or from competing effectively in the business. In the electric power business, for example, companies with bottleneck power have charged high wholesale tariff rates to firms that wished to compete with them for retail sales. 9/ These wholesale tariff rates have created a price squeeze that foreclosed the retail competitors.

9/ E.g., City of Kirkwood v. Union Electric Co., supra; City of Groton v. Connecticut Light & Power Co., supra.

When the competitors have sued, the bottleneck companies assert that Keogh bars damages because the competitive injury was caused by tariff rates.

A similar argument has been made in the Lake Erie Iron Ore cases. There it has been argued that suit by vessel companies is barred by Keogh because the foreclosure of self unloaders was accomplished by tariffs charging high dock handling rates, and that suit by private docks is barred because they were foreclosed by tariffs charging high "class" rates on shipments of ore from these docks.

In its more inventive forms, the argument based on Keogh has a number of versions. One is that suit by a foreclosed competitor is barred because his inability to enter business was caused by the defendant's failure to file a tariff rate

that would have allowed the foreclosed party to compete. Again, the iron ore cases exemplify this. There the defendants argue that Keogh bars suit by private docks because these docks were foreclosed by the railroads' refusal to grant the same low "commodity" rate on movements of ore from the private docks as on movements from railroad docks. Similarly, it is urged that Keogh bars suits by ship companies because self unloaders were foreclosed by a refusal to establish dock handling rates that reflected the actual dock savings attributable to self unloaders.

Another inventive version of the Keogh argument has also been offered in the iron ore litigation. This version is that Keogh precludes competitors such as private docks from obtaining damages for lost profits, because the exact amount of such profits

would have depended in part on the extent to which railroads would have filed lower dock tariffs that would have encouraged the construction and use of self unloaders. Put differently, the argument is that Keogh bars private docks from recovering their own lost profits because the precise amount of those profits allegedly would have depended on the tariff rates charged by railroad docks.

Thus, Keogh has been used in a number of ways to try to bar antitrust suits where bottleneck monopolists used power at one level to foreclose companies that wished to do business at another level--usually one at which the foreclosed company would have been a direct competitor of the monopolist. Such use of Keogh has ranged from claims that suit is precluded because based on the monopolist's filed rates, to claims that

suit is precluded because based on the monopolist's refusal to file rates, to claims that suit is precluded because the competitor's lost profits depend on the extent to which the monopolist would have filed new, lower rates.

II. THIS COURT SHOULD MAKE CLEAR THAT KEOGH CANNOT BE USED IN ANY WAY TO PRECLUDE DAMAGE ACTIONS BY FORECLOSED COMPETITORS

The efforts tc use Keogh to block antitrust damage suits by foreclosed competitors have been consistently rejected by numerous courts of appeal and district courts. 10/ Amici believe these lower court decisions are correct. 11/

10/ See cases in note 8, supra.

11/ Amici know of only one potential exception to the numerous lower court rejections of attempts to use Keogh to bar suit by foreclosed competitors. In the Pinney case the district court, after first ruling that suit by competitors was not barred by Keogh, later indicated on motion for reconsideration that damages would be

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precluded by the Keogh doctrine if they are dependent on hypothetical rates that would have been filed with the ICC by the railroads. Pinney Dock & Transport Co. v. Penn Central Corp. et al., 600 F.Supp. 859 (N.D. Ohio 1983). However, the Court subsequently appeared to be satisfied, at least as of the present, that damages would not depend on such rates. Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, Memorandum and Order of March 10, 1984.

Amici also note that antitrust defendants occasionally claim Keogh should be used to bar suits by foreclosed competitors because of this Court's decision in Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945). In that case the state of Georgia was held unable to bring a damage action because of Keogh, and defendants occasionally assert suits by competitors are therefore barred because Georgia had sued both as parens patriae for its citizens and as proprietor of a railroad. This argument is plainly incorrect. It has not even merited mention in most of the cases rejecting the use of Keogh to bar suits by competitors (see generally, cases cited in note 7, supra), and where mentioned by courts it has been summarily rejected because this Court treated Georgia as a shipper, not a competitor. Pinney Dock & Transport Co. v. Penn Central Corp. et al., supra, 600 F.Supp. at 879, 1983-2 Trade Cases ¶65,607, p. 69,031; Marnell v. United Parcel Service of America, supra, 260 F.Supp. at 406.

Amici further believe that for reasons elaborated by Judge Friendly in the decision below, by petitioners, and by the United States, Keogh should be totally overruled, so that it no longer will bar suit by any party, be the party an injured shipper or a foreclosed competitor. But amici also urge that, even if Keogh retains full or partial validity in suits by shippers, the Court should make clear that Keogh cannot be used in any way to preclude damage suits by competitors. The reasons are that use of Keogh to bar damage suits by foreclosed competitors is inconsistent with the holding of and the fundamental reasons for the Keogh opinion, is inconsistent with the limited nature of antitrust exemptions, expands immunity beyond Congressional grant, would enable bottleneck monopolists to thwart competi-

tion, innovation and cheaper prices with impunity from antitrust damage actions, and would thereby remove a prime deterrent to anticompetitive acts and thwart economic progress.

A. The Holding Of And The Major Reasons Underlying Keogh Are Inapplicable To Suits By Competitors

Keogh held that "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff....[T]his rate is made, for all purposes, the legal rate, as between carrier and shipper." 260 U.S. at 163 (emphasis added). The reason is that "otherwise the paramount purpose of Congress--prevention of unjust discrimination--might be defeated." Ibid. (Emphasis added.) For "[i]f a shipper could recover [antitrust] damages resulting from the exaction of a rate higher than that

which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a a preference over his trade competitors." Id. at 164. (Emphasis added.)

Thus, by its own express language, Keogh is confined to barring suits by shippers against carriers, and does not affect suits by competitors. Nor does the prime reason for barring suits by shippers apply to suits by competitors: the Interstate Commerce Act's "paramount purpose" of "prevention of unjust discrimination" by which certain shippers obtained financial benefits such as rebates that were denied other shippers is irrelevant to suits by competitors. Competitors do not sue to obtain financial benefits such as rebates that were discriminatorily denied to shippers. Rather, competitors sue because they were precluded from competing

for business. 12/

In this connection amici also point out that, although antitrust defendants often assert that suits by foreclosed competitors are barred because Keogh expressed concern that tariff rates relied on by plaintiffs would be hypothetical, such concern was expressly related to the fear that a hypothetical rate would be discriminatory against shippers other than the specific shipper plaintiffs who filed suit. 260 U.S. at 163-164. In other words, the concern over hypothetical rates specifically and in terms related to Congress' "paramount purpose" of preventing

12/ In the iron ore cases, neither the self unloaders, nor the private docks, nor the truckers were shippers. (The steel mills were the shippers.) Since they were not shippers, the self unloaders, docks and truckers did not pay the railroads. Accordingly, the entire concept of receiving financial benefits such as rebates of prior payments to the railroads is irrelevant in their cases.

discriminatory practices such as rebates that gave some shippers financial benefits denied other shippers, and is irrelevant to suits by foreclosed competitors, who do not sue to obtain financial benefits such as rebates that were discriminatorily denied to shippers, but who instead sue because they were precluded from competing for business.

Also, there are additional reasons why Keogh's concern over hypothetical tariff rates cannot preclude antitrust damage actions by foreclosed competitors. As shown by Judge Friendly's opinion below, even when suit is brought by a shipper, in today's world there is no longer a foundation for Keogh's concern that a hypothetical rate might be discriminatory. Furthermore, and of great importance, today it is common practice in antitrust litigation to determine the charges, prices and profits

that would have prevailed in the absence of anticompetitive actions. Finally, the lost profits of a foreclosed competitor often depend quite heavily on costs and expenses wholly aside from tariff rates. Indeed, in the iron ore cases, the foreclosed private docks, truckers and self unloaders would not even have paid tariff charges to railroads, since the docks, truckers and vessels were not shippers. 13/

B. The Application of Keogh to Bar Suits By Competitors is Contrary to this Court's Jurisprudence Regarding Implied Immunities and Would Impermissibly Extend Immunity Beyond The Congressional Grant

13/ In addition to reasons discussed above, the Keogh opinion sets forth certain other reasons for its holding. Those reasons have been severely and accurately criticized in the decision below, in papers filed by petitioners, and in papers filed by the United States. Amici join in those criticisms but shall confine their discussion to the holding and major reasons for Keogh, since these show its inapplicability to suits by competitors.

This Court has repeatedly held that implied immunities from the antitrust laws are not favored, and will be found only when there is clear repugnancy between a regulatory scheme and application of the antitrust laws. Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682 (1975); Otter Tail Power Co. v. United States, supra, 410 U.S. at 372; United States v. Philadelphia National Bank, 374 U.S. 321, 350-351 (1973). In the absence of a clear and irreconcilable conflict, the Court has been unwilling to extend antitrust immunities beyond the boundaries demarcated by Congress in regulatory statutes. Ibid.

Application of Keogh to bar suits by competitors would run directly contrary to this jurisprudence. It would provide de facto immunity from antitrust damage suits alleging foreclosure of competition, even though such immunity is not provided or

necessitated by regulatory statutes themselves. It is thus little wonder that bottleneck monopolists seek to use Keogh to preclude suit by foreclosed competitors in precisely the subject matter areas where arguments for express or implied regulatory immunity have failed. 14/ Keogh is thus asserted to try to extend immunity beyond the Congressional grant. Such extension is impermissible under this Court's cases.

C. The Use of Keogh to Bar Suits by Competitors Is Inconsistent with Requirements of the National Economy and with Sound Antitrust Policy

The use of Keogh to preclude suits by foreclosed competitors would enable bottleneck monopolists to thwart competition, technological innovation and cheaper prices in basic industries, without having to fear

14/ See cases cited in notes 7 and 8, supra.

that they will one day be called to account in antitrust damages. This is clear from the fact that Keogh has been asserted as a bar to competitors' suits in fundamental industries such as the telephone, electric power and railroad industries.

As discussed above, in these industries, companies with monopolistic power at one or more levels of the business have used that power to prevent competition and innovation at other levels. Such stifling use of monopolistic power sometimes went on for years on end or for decades, as in the telephone and railroad businesses. The bottleneck monopolists then asserted Keogh as a bar to suit by foreclosed competitors.

If attempts to impose such a bar were effective, one of the most powerful deterrents to anticompetitive conduct would be eliminated: antitrust treble damages would be unavailable. The unavailability of

treble damages would greatly encourage the kinds of competition-destroying, technology-retarding actions that have been at issue in cases involving the telephone, electric power and railroad industries. To encourage such conduct is obviously inconsistent with the needs of the national economy, which requires technological innovation and improvements that result in lower prices. It is also inconsistent with sound antitrust policy, since the antitrust laws are intended to promote innovation and lower prices, Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958); and since unlawfully foreclosed competitors have traditionally had a remedy of treble damages under the antitrust laws.

Finally, the undesirability of allowing Keogh to shield anticompetitive conduct is heightened by additional factors. One is that in some cases the

conduct sought to be immunized by Keogh has been undertaken with maximum possible secrecy. Also, Keogh is invoked on a very expansive basis: it is urged not just where bottleneck monopolists filed rates, but where they refused to do so, and to try to bar damages on the ground that victims' lost profits would have depended on the level of new tariff rates that monopolists might have filed. The use of Keogh to protect anticompetitive conduct undertaken in secrecy, and efforts to apply Keogh with great expansiveness, heighten its inconsistency with national economic welfare and antitrust policy. For such use and efforts increase its capacity to immunize and thereby encourage activity that retards technological innovation and lower prices.

CONCLUSION

Amici believe Keogh should be totally overruled. But if the Court were to hold

that Keogh retains any validity in suits brought by shippers, it should simultaneously make clear that, for reasons given above, Keogh is in no way a bar to antitrust damage actions brought by foreclosed competitors.

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